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In the Supreme Court of the United States

OCTOBER TERM, 1957

ANTHONY GIARDANO AND ANTHONY LOPIPARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 21-37) is reported at 251 F. 2d 109.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1958. (Pet. 39.) A petition for rehearing was denied on February 10, 1958. On March 1, 1958, by order of Mr. Justice Whittaker, the time for filing a petition for certiorari was extended to April 10, 1958. The petition was filed on April 9, 1958. The jurisdic-

tion of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court's charge or failure to charge in several respects now complained of was plain error of a character which this Court ought to notice in the absence of objections in the trial court.

2. Whether one of the overt acts alleged in the indictment charging conspiracy to evade taxes was legally insufficient and another unsupported by the evidence.

3. Whether, under the doctrines of double jeopardy and *res judicata*, dismissal by the Government at the close of the evidence of the count charging petitioners with tax evasion barred their conviction in the same proceeding on the count charging conspiracy to evade taxes.

4. Whether the court erred in denying petitioners' pre-trial motions to strike from the indictment as prejudicial surplusage allegations that customers were compelled by pressure and coercion to use the services of petitioners' corporation.

STATUTES AND RULES INVOLVED

Statutes:

18 U. S. C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall

be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

Federal Rules of Criminal Procedure:

Rule 7. The Indictment and the Information

* * * * *

(d) *Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information.

* * * * *

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Harmless Error and Plain Error

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On November 9, 1954, in the United States District Court for the Eastern District of Missouri, an indictment in two counts was returned against the petitioners, together with one Ralph Caleca and the Twin City Distributing Company, a corporation of which the named individuals were the sole stockholders and officers.

Count one charged a wilful attempt to evade the income taxes of the corporation for its fiscal year ended March 31, 1953, by filing a false corporation tax return in violation of Section 145(b) of the Internal Revenue Code of 1939; and count two charged a conspiracy to evade the corporate taxes by sundry means, in violation of 18 U.S.C., Section 371. (R. 1-6.) A severance was granted as to defendant Caleca, who was not in custody. (R. 11.) After a jury trial, petitioners were found guilty as charged in count two.[1] (R. 174.) On October 29, 1956, each of the petitioners was sentenced to imprisonment for four years and fined $5,000 and costs. (R. 178-179.) The Court of Appeals unanimously affirmed. (Pet. App. 21-37.)

Count two of the indictment alleged in substance that, beginning about January 1, 1952, and continuing through May 27, 1953, petitioners, together with Caleca, conspired to evade the payment of corporate taxes on income received from cigarette vendors for affixing counterfeit City of St. Louis cigarette tax stamp impressions on packages of cigarettes sold at retail through vending machines. The following overt acts were alleged in the indictment: (1) compelling cigarette vendors through the use of fear and economic coercion to employ the corporation's tax stamping services; (2) the use of a counterfeit tax stamp die; (3) the receipt of some $27,000 in cash from vendors and a failure to record such sum in the corporation's books; (4) demands on the vendors to pay partly by check and partly in cash for stamping services; (5) issuing receipts to vendors for payment made by check but failing to issue

[1] The Government dismissed count one at the close of the evidence. (R. 146.)

receipts for cash payments; (6) instructing a customer not to record cash payments to the corporation; (7) withholding cash receipts from the corporate depository; and (8) filing a corporate tax return on May 27, 1953. (R. 2-6.)

The evidence to support the verdict may be summarized as follows:

Petitioners, together with Caleca, were the sole stockholders and officers of the Twin City Distributing Company, a Missouri corporation organized in March 1952 to carry on the business of a partnership of which the three were members. (R. 28-29, 44.) The corporation was engaged in the business of selling cigarettes at retail through vending machines. It also made sales of cigarettes at wholesale and, in addition, received income from other cigarette dealers for affixing a city tax stamp on their cigarettes. (R. 52-54.) The corporation's books were kept and its returns were prepared on the basis of a fiscal year ending March 31. (R. 29, 44-46.)

At all times material, the City of St. Louis levied a two-cent tax on each package of cigarettes sold at retail. The City authorized a number of dealers, including Twin City Distributing Company, to affix the stamp tax impression not only on their own cigarettes but on those of other dealers as well by use of a Pitney-Bowes stamping meter in which the City would set the number of impressions purchased. Dealers authorized to use the stamping meters were given a discount by the City of ten per cent. The discount was reduced in February 1953 to seven percent. (R. 35-41.)

During 1952 and the first three months of 1953, petitioners and Caleca, sometimes singly and at other times together, persuaded six cigarette dealers to have

their tax stamping done by the corporation, part at the legal rate and part at a cut rate. In most instances, the dealers refused petitioners' initial solicitation and agreed to have the corporation do their tax stamping only after the loss of vending machine locations. (R. 55-57, 64, 75-76, 91-92, 97-99, 102-105.) For example, dealer Siegel testified that he was approached on four occasions before agreeing to have his cigarettes stamped by the corporation; and that each refusal was followed by a loss of vending machine locations. (R. 102-103.) There was evidence that four of the dealers lost "stops" to the corporation before agreeing to use its tax stamping service. (R. 56, 64, 76, 102-103.)

Under the arrangement which petitioners made with the dealers, the corporation stamped part of their cigarettes at the legal rate of $10 an average case and part at a reduced rate of $6 an average case. The stamping was done on the corporation's premises. The cut-rate stamping was paid for by the dealers in cash for which sums they were given no receipts. These cash payments were usually made to one of the petitioners or Caleca. The dealers were given receipts for the legal rate stamping which in most instances was paid for by check. According to the testimony of the six dealers, a total of $26,175 was paid to petitioners for cut-rate stamping by the corporation during its fiscal year ended March 31, 1953. (R. 55-108, 134-136.)

The cash sums received by petitioners for the cut-rate stamping were not entered on the corporation's books from which its tax return was prepared and were not deposited in its bank account. Neither the corporation's bookkeeper nor the accountant who prepared the return had any knowledge of the cash payments for cut-

rate stamping. (R. 44-55.) The corporate tax return was signed by petitioner Lopiparo, as president, and Caleca, as treasurer. A tax liability of $2,503 was reported in the return. (R. 29-30.) Internal Revenue Agent Horn testified that, if the $26,175 received for cut rate stamping were added to the corporation's gross income as reported ($187,177), the corporation's tax liability would be $14,177. (R. 140-141.)

The corporation's books showed stamping income from the six dealers who testified totaling $11,874 (R. 133), plus $3,950 received from a seventh dealer (Ex. 42), or a total of $15,824 for the year in question. The recorded legal rate stamping income, $15,824, plus the unrecorded sums received for cut-rate stamping, $26,175, totalled $41,999. (R. 136.) During the same period, the corporation paid a total of only $28,653 to the City of St. Louis for tax stamp impressions, including those purchased for cigarettes sold by it. (R. 30, 40, 48.) A body of evidence was received over petitioners' objection revealing that packages of cigarettes purchased by police officers in September 1953 from vending machines licensed to the corporation, had counterfeit city tax stamp impressions. (R. 109-122.) The court permitted the jury to consider this evidence only as bearing on the question of intent. (R. 157-158.)

Petitioners did not present any evidence. The defense rested at the conclusion of the Government's case and moved for judgment of acquittal on the ground that the evidence was insufficient to sustain a judgment of conviction. (R. 145-146.) The court, having reserved ruling on the motion (R. 146), denied it after verdict (R. 177).

The court's lengthy charge to the jury (R. 146-171), included a reading of the conspiracy statute (R. 149)

and of count two of the indictment (R. 149-153). The court, among other things, reviewed for the jury the contentions of the parties (R. 156-157) and instructed the jury as to the essential elements of the offense of tax evasion as well as that of conspiracy (R. 158-164). Under the charge, the conspiracy alleged was specifically limited to the objective of evading the corporation's income taxes, and the jury was instructed to find petitioners not guilty unless this was proven beyond a reasonable doubt. (R. 158.) The jury was also admonished that it must consider the charge as a whole (R. 148) and that its verdict must be unanimous (R. 170). The instructions to the jury read, in part, as follows (R. 158, 162-164, 170):

> Under Count 2 of the indictment it is necessary for the government to prove that defendants entered into a conspiracy specifically to defeat and evade the federal income tax liability of the Twin City Distributing Company. It is not sufficient if you find that defendants entered into a conspiracy or agreement, and that such conspiracy or agreement contemplated the violation of other federal, state or city laws. If you believe that defendants only conspired to violate any other federal, state or city laws, you must find the defendants not guilty.
>
> * * * * *
>
> It is, therefore, necessary as to Count 2 of the indictment, before you can convict the defendants, or either of them, that you find beyond a reasonable doubt that there was a conspiracy, and that the acts charged to have been committed by the defendants were intentionally committed

by the defendants pursuant to the conspiracy, and that the acts were committed for the purpose and object of advancing the conspiracy charged, and with the knowledge that if the plan of the conspiracy was accomplished, the conspiracy would directly and substantially affect the income tax liability of the Twin City Distributing Company for the fiscal year ending March 31, 1953, by substantially reducing the net income and the amount of income taxes the corporation would owe, and was known to the defendants when they entered into the conspiracy.

* * * * *

The mere failure of the Twin City Distributing Company to include and report income in its return and to pay the tax on it, even if defendants knew that it was due, would not constitute the offense of conspiracy to defeat and evade corporate income tax. You may not find defendants guilty of conspiracy to defeat and evade corporate income tax if you find only that they or either of them willfully filed a false return and failed to pay the amount of the tax due. Even if you should find that defendants or either of them filed a false return, yet before you can find the defendants guilty under the indictment in this case it is necessary that you find and believe beyond a reasonable doubt that in addition to the filing of the return defendants also conspired to commit some affirmative and positive act of fraud in connection with the corporate income tax return of the Twin City Distributing Company.

* * * * *

> When all of you agree to a verdict, then the verdict is the verdict of you as a jury. Your verdict must be unanimous.

Petitioners objected, among other things, to the portions of the charge in which the jury was instructed that the conspiracy offense is complete if any one of the overt acts alleged was committed. This objection was made on the grounds that overt acts Nos. 1, 4, and 6 were not supported by the evidence and that overt act No. 8, if proven, was insufficient as a matter of law. Petitioners did not move the court to withdraw the challenged overt acts from the jury's consideration and did not request the court to instruct the jury to find specially the overt act or acts upon which the verdict rested. (R. 171-172.) At the request of the jury, the charge was given a second time, except for the initial paragraphs relating to the duties of jurors, and petitioners renewed the objections they had previously made. (R. 173-174.)

ARGUMENT

1. Petitioners contend that the instructions to the jury were deficient in the following respects: (a) that the jury was not adequately instructed on the offense of tax evasion, which was the alleged object of the conspiracy (Pet. 10-12); (b) that the jury was not specifically instructed that unanimity is essential as to the particular overt act (or acts) found to be in furtherance of the conspiracy (Pet. 12-13); (c) that the jury was not required to find specially the overt act (or acts) on which their verdict rested (Pet. 13-14); and (d) that the charge was so framed that petitioners could

have been convicted of an offense (*i. e.*, conspiracy to defraud the United States) not charged in the indictment (which charged a conspiracy to evade taxes) (Pet. 15-18).

None of the points now assigned as error was preserved by petitioners in the trial court (R. 171-174) by a request to charge or by objections to the charge as given, as required by Rule 30, Federal Rules of Criminal Procedure (*supra*, p. 4). Since the alleged errors were not properly preserved, petitioners cannot be heard to complain now unless the error assigned is so plain and prejudicial as to require reversal by this Court to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings. See *United States* v. *Atkinson*, 297 U. S. 157; *Herzog* v. *United States*, 235 F. 2d 664 (C. A. 9th), certiorari denied, 352 U. S. 844; *Schumacher* v. *United States*, 216 F. 2d 780 (C. A. 8th), certiorari denied, 348 U. S. 951; *United States* v. *Sansone*, 231 F. 2d 887 (C. A. 2d), certiorari denied, 351 U. S. 987; *Lash* v. *United States*, 221 F. 2d 237 (C. A. 1st), certiorari denied, 350 U. S. 826. Rules 30 and 52, Federal Rules of Criminal Procedure (*supra*, p. 4). Even if there were error here, it is hardly plain error of a character which this Court ought to notice. Furthermore, with the exception of the first point, the matters now complained of were not raised by petitioners in the Court of Appeals, and this Court has repeatedly ruled that only in exceptional cases will it review a question not raised below. *Lawn* v. *United States*, 355 U. S. 339; *Husty* v. *United States*, 282 U. S. 694; *Duignan* v. *United States*, 274 U. S. 195. No exceptional circumstances exist here.

In any event, the court's charge (R. 146-171) was a model of clarity and completeness, and the points raised by petitioners are without merit. (a) The contention that the jury was not adequately instructed on the offense of tax evasion which was the alleged object of the conspiracy boils down to a complaint that the court failed to read to the jury Section 145(b) of the Internal Revenue Code of 1939 (*supra*, p. 3). However, it is apparent from the charge as a whole, as the court below noted (Pet. 33), that the "content of the statute was clearly before the jury."

(b) As to the requirement of unanimity in the jury verdict, the jury was expressly instructed (*supra*, p. 11) that their verdict must be unanimous. Whether the verdict here could have been founded on an insufficient (factually or legally) overt act is not, as petitioners imply (Pet. 12-13), left to speculation. As we shall show (*infra*, p. 14), and as the court below pointed out (Pet. 27-30, 36-37), there is no substance to petitioners' attack on some of the overt acts alleged in the indictment. (c) And, for that reason, there likewise is no substance to petitioners' argument (Pet. 13) that special findings on the overt acts, no provision for which is made in the Federal Rules of Criminal Procedure, were required here.

(d) Finally, petitioners' contention that the instructions were so framed that they could have been convicted of a conspiracy to defraud the United States, rather than a conspiracy to evade taxes as charged in the indictment, ignores the plain language and import of the instructions. The jury was pointedly instructed (*supra*, pp. 9-10) on the necessity for the Government to

prove that petitioners entered into a conspiracy for the specific purpose of evading the corporation's income taxes.

Contrary to petitioners' assertions (Pet. 10-12), the decision below is not in conflict in any way with the decision of the Court of Appeals for the Ninth Circuit in *Morris* v. *United States*, 156 F. 2d 525, or the decision of the Court of Appeals for the Third Circuit in *United States* v. *Levy*, 153 F. 2d 995. Here, unlike the situation in the *Morris* and *Levy* cases which involved prosecutions for violation of the Emergency Price Control Act, the jury was fully instructed on the offense charged in the indictment.

2. Petitioners contend (Pet. 13-15) that, while the jury was allowed to convict if they found the commission of any one of the overt acts alleged, overt act No. 8 is legally insufficient, since it alleged only the filing of a corporate return and not a false return, and overt act No. 1, alleging the use of fear and compulsion, is not supported by the evidence. As to overt act No. 8, it suffices to note that petitioners ignore the allegation of means in the indictment, namely, that it was part of the conspiracy that petitioners would prepare and cause to be filed "a false and fraudulent tax return for * * * the said corporation" (R. 3). The allegation of the overt act—that the return was filed—makes plain that the means alleged were employed. With respect to overt act No. 1, there is ample evidence (*supra*, p. 7), as the court below pointed out (Pet. 27-28), to support the allegation that petitioners used fear and coercion—at least to the extent of economic pressure—in obtaining customers for the corporation's cut-rate tax stamping service.

3. Petitioners contend (Pet. 18) that, under the doctrines of double jeopardy and *res judicata*, the Government's dismissal at the trial of the count charging the substantive offense of tax evasion barred their conviction in the same proceeding on the count charging conspiracy to commit the substantive offense because "the evidence adduced to sustain the charge under each count was the same, and the two offenses were in fact identical." This issue also was not raised in the Court of Appeals. (See discussion, *supra*, p. 12.) Not only are there no exceptional circumstances present here which would require review by this Court in the absence of an assignment of error below, but also the argument is without merit.

In *United States* v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924, the Court of Appeals for the Second Circuit only recently rejected a similar argument, observing (p. 919) that "it is clear that there is no double jeopardy from differing dispositions of counts of a single indictment at a single trial." See *Dunn* v. *United States*, 284 U.S. 390; *Dealy* v. *United States*, 152 U.S. 539; *Barsock* v. *United States*, 177 F. 2d 141 (C.A. 9th); *Corbin* v. *United States*, 205 Fed. 278 (C.A. 8th). Moreover, contrary to petitioners' assertion (Pet. 18), the offenses charged are not identical. Here, as in *Pereira* v. *United States*, 347 U.S. 1, the substantive offense charged (tax evasion) does not require more than one person for its commission; whereas conspiracy requires proof of an agreement to commit an offense against the United States, proof not necessary to conviction on the substantive offense. With respect to *res judicata*, it suffices to note, as this Court pointed out in *Sealfon* v.

United States, 332 U.S. 575, 578, that the doctrine operates to conclude only those matters in issue which the verdict determined. Here there was no verdict as to the first count of the indictment.

4. Finally, petitioners contend (Pet. 19-20) that the court erred in denying their pre-trial motions under Rule 7(d), Federal Rules of Criminal Procedure (*supra*, p. 3), to strike from the indictment, as prejudicial surplusage, allegations that they compelled customers by "pressure", "coercion" and "fear" to use the corporation's tax stamping service. To the grounds alleged in the trial court, petitioners now add (Pet. 19-20) that the allegations are unsupported by the evidence. This contention is also without merit.

It can hardly be said from a fair reading of the indictment (R. 1-6) that the allegations complained of were mere surplusage unrelated to the offenses charged. See *United States* v. *Klein*, 124 F. Supp. 476 (S.D. N.Y.). The point need not be labored that, if petitioners were to profit from their fraudulent schemes, it was necessary for them to obtain customers for the corporation's cut-rate tax stamping service; and it is a fair inference from the evidence (*supra*, pp. 6-7) that they set out to secure those customers by fair means or foul. To assert, as do petitioners, that the allegations are without support in the evidence is to ignore the facts of record. There was, as the court below noted (Pet. 27-28), credible evidence to support "[t]he charge of compulsion by the medium of fear, at least of economic loss".

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari raises no question calling for review by this Court and should be denied.

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